

No. 14983

United States
Court of Appeals
for the Ninth Circuit

THEODORE B. RUSSELL, **Appellant,**
vs.

THE TEXAS COMPANY, a Corporation; FREDERICK T. MANNING DRILLING COMPANY, a Corporation; and The Northern Pacific Railway Company, a Corporation,
Appellees.

THE TEXAS COMPANY, a Corporation,
Appellant,

THEODORE B. RUSSELL,
Appellee.

Supplemental
Transcript of Record

**Appeals from the United States District Court
for the District of Montana**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Company and Northern Pacific Railway
Company.

In the District Court of the United States for the
District of Montana, Billings Division

No. 1448

THEODORE B. RUSSELL,

Plaintiff,

vs.

THE TEXAS COMPANY, a Corporation; FRED-
ERICK T. MANNING DRILLING COM-
PANY, a Corporation; and THE NORTHERN
PACIFIC RAILWAY COMPANY, a Corpo-
ration,

Defendants.

REQUEST FOR ADMISSION OF FACTS

To: Ralph J. Anderson, Esq., 517 Power Block,
Helena, Montana, Attorney for Plaintiff.

Please take notice that the defendants hereby request the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within 10 days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. A map of the general route over which the Northern Pacific Railroad Company proposed to construct its railroad through the Territory of Montana was filed in the office in Washington, D.C., of the Commissioner of the General Land Office of

the United States of America on February 21, 1872. On April 22, 1872, the said Commissioner transmitted to the Register and Receiver of the local land office at Helena, Montana, a map showing the said designated route of said railroad along with an order by direction of the Secretary of Interior of the United States of America directing said Register and Receiver to withhold from sale, location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles on either side of said railroad as designated on said map. All of Section 23, Township 17 North, Range 53 East, M.P.M., was within a distance of 40 miles from said railroad as designated on said maps. On May 6, 1872, said Register and Receiver acknowledged receipt of said map and said order.

2. Thereafter the construction of that portion of said railroad was completed between Glendive Creek and the Tongue River in the Territory of Montana. A map showing the definite, fixed and completed location of said portion was filed in the office of the Commissioner of the General Land Office of the United States of America on June 25, 1881.

3. At all times since February 21, 1872, Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian has been, and now is, an alternate odd-numbered section located less than 40 miles from the general route proposed for said line of railroad through the Territory of Montana; and at all times on and after June 25, 1881, said

section of land has been, and now is, an alternate odd-numbered section located less than 40 miles from and adjacent to that portion of the definite, fixed and completed line of said railroad as it was constructed between Glendive Creek and the Tongue River in the Territory of Montana.

4. The United States of America surveyed the land through the Territory of Montana and the State of Montana located within 40 miles on either side of said definite, fixed and completed line of railroad and, on September 21, 1900, caused a plat of survey to be filed with the General Land Office of the United States of America, which included all of said Section 23 in Township 17 North of Range 53 East of the Montana Principal Meridian which showed the location of said section with respect to said completed line of railroad.

5. The Northern Pacific Railway Company, on September 22, 1900, filed in the local office of the General Land Office of the United States of America at Miles City, Montana, its Place List No. 36 in which it designated, along with other lands, all of Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, which list was thereafter on September 30, 1900, duly approved by the local land officers of said General Land Office. The said Place List No. 36, filed September 22, 1900, as aforesaid, and the approval of September 30, 1900, by the local land officers of the said General Land Office, except for the description of the lands designated therein, reads as follows, to wit:

“Land Department

“Northern Pacific Railway Company

“List No. 36 (Place)

“State of Montana

“U. S. Land Office at Miles City

“....., 19 ..

“Northern Pacific Railway Company, the successor of the Northern Pacific Railroad Company, under and by virtue of the Acts of Congress, entitled ‘An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget’s Sound, on the Pacific Coast, by the Northern Route,’ approved July 2, 1864, and ‘A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes,’ approved May 31, 1870, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location of the line of route of the Northern Pacific Railroad, being for a section of miles of the same, commencing at Little Missouri River and ending at Tongue River, the selections being particularly described as follows, to wit:

“(Description of lands designated.)

“State of Minnesota,

“County of Ramsey—ss.

“I, Wm. H. Phipps being duly sworn, depose and say, that I am the Land Commissioner of the Northern Pacific Railway Company; that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Northern Pacific Railway Company as ensuing to said Company, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route, for which a grant of lands was made by the act of Congress approved July 2, 1864, and the joint resolution approved May 31, 1870; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of forty miles on each side of the line of route for a continuous distance of miles, being a portion of the lands for a section of miles of said railway, commencing at Little Missouri River and ending at Tongue River.

“[Seal]

WM. H. PHIPPS.

“Sworn and subscribed before me this twentieth day of September, 1900.

“[Seal] /s/ W. F. VON DEYN,

“Notary Public, Ramsey
County, Minnesota.

“United States Land Office
“Miles City, Montana

“Sept. 30, 1900.

“We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant, by Act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railway Company by Wm. H. Phipps, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office.

“We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the Act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated November 7, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Office; and that

the said Company have paid to the undersigned, the Receiver, the full sum of Eight Hundred and Sixty-four (\$864.00) Dollars, in full payment and discharge of said fees.

“S. GORDON,
“Register.

“JAS. M. RHOADES,
“Receiver.”

6. Each year since March 1, 1919, Dawson County, Montana, has levied and assessed against the Northern Pacific Railway Company a tax on said company's reserved right of entry into said Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, all of which taxes have been paid by said company.

You are further notified that in the event of your refusal to admit the foregoing facts, defendants will request the Court, pursuant to Rule 37 of the Federal Rules of Civil Procedure, for an order requiring plaintiff to pay the reasonable expenses incurred in obtaining and making such proof, including reasonable attorney's fees.

Dated this 5th day of February, 1953.

COLEMAN, JAMESON &
LAMEY,

By CALE CROWLEY,
Attorneys for Defendants.

Of counsel for Defendant Railway Company:

ROBERT P. DAVIDSON,
M. L. COUNTRYMAN, JR.

Of counsel for Defendants, The Texas Company
and Frederick T. Manning Drilling Company:

WALTER E. WILLS.

[Endorsed]: Filed February 19, 1953.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR
ADMISSIONS OF FACTS

To: Coleman, Jameson & Lamey, 516 Electric Building,
Billings, Montana, Attorneys for Defendants.

Plaintiff hereby responds to the defendants' request for admissions of facts on file herein, made pursuant to Rule 36 of the Federal Rules of Civil Procedure, for the purposes of the above-entitled action only, and subject to all pertinent objections as to admissibility which may be interposed at the trial, as follows:

1. Admits that a map of the general route over which the Northern Pacific Railroad Company proposed to construct its railroad through the Territory of Montana was filed in the office in Washington, D. C., of the Commissioner of the General Land Office of the United States of America on

February 21, 1872. On April 22, 1872, the said Commissioner transmitted to the Register and Receiver of the local land office at Helena, Montana, a map showing the said designated route of said railroad along with an order by direction of the Secretary of Interior of the United States of America directing said Register and Receiver to withhold from sale, location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles on either side of said railroad as designated on said map. All of Section 23, Township 17 North, Range 53 East, M.P.M., was within a distance of 40 miles from said railroad as designated on said maps. On May 6, 1872, said Register and Receiver acknowledged receipt of said map and said order.

2. Admits that thereafter the construction of that portion of said railroad was completed between Glendive Creek and the Tongue River in the Territory of Montana. A map showing the definite, fixed and completed location of said portion was filed in the office of the Commissioner of the General Land Office of the United States of America on June 25, 1881.

3. Admits that at all times since February 21, 1872, Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian has been, and now is an alternate odd-numbered section located less than 40 miles from the general route proposed for said line of railroad through the Territory of Montana; and at all times on and after June 25,

1881, said section of land has been, and now is, an alternate odd-numbered section located less than 40 miles from and adjacent to that portion of the definite, fixed and completed line of said railroad as it was constructed between Glendive Creek and the Tongue River in the Territory of Montana.

4. Admits that the United States of America surveyed the land through the Territory of Montana and the State of Montana located within 40 miles on either side of said definite, fixed and completed line of railroad and, on August 21, 1900, caused a plat of survey to be filed with the General Land Office of the United States of America, which included all of said Section 23 in Township 17 North of Range 53 East of the Montana Principal Meridian which showed the location of said section with respect to said completed line of railroad.

5. Admits that the Northern Pacific Railway Company, on September 22, 1900, filed in the local office of the General Land Office of the United States of America at Miles City, Montana, its Place List No. 36 in which it designated, along with other lands, all of Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, which list was thereafter on September 30, 1900, duly approved by the local land officers of said General Land Office. The said Place List No. 36, filed September 22, 1900, as aforesaid, and the approval of September 30, 1900, by the local land officers of the said General Land Office, except for the descrip-

tion of the lands designated therein, reads as set forth in said Request for Admissions.

6. Admits that each year since March 1, 1919, Dawson County, Montana, has levied and assessed against the Northern Pacific Railway Company a tax on said company's reserved right of entry into said Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, all of which taxes have been paid by said company.

Dated this 5th day of May, 1953.

RALPH J. ANDERSON,
Attorney for Plaintiff.

[Endorsed]: Filed May 9, 1953.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

It appearing that the parties hereto, acting through their respective counsel of record, entered into a stipulation for a correction of the record on appeal by the filing of a supplemental record, pursuant to the authority of Rule 75 (h) of the Federal Rules of Civil Procedure, and that in response to said stipulation, Paul P. O'Brien, Clerk of the United States Court of Appeals of the Ninth Circuit, suggested to the parties hereto that they obtain

from me a supplemental record and send it to the said Clerk of the United States Court of Appeals for the Ninth Circuit for filing,

Now, Therefore, I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, hereby certify and transmit to the United States Court of Appeals for the Ninth Circuit by way of a supplemental record on appeal, a full, true and correct transcript of those portions of the record in Case No. 1448 requested, and I do hereby certify and return to the Honorable United States Court of Appeals for the Ninth Circuit the foregoing transcript of the "Request for Admission of Facts" and of the "Response to Request for Admission of Facts" designated for the Supplemental Record on Appeal herein, as appears from the original records and files of said Court in my custody as such Clerk.

Witness my hand and the seal of said Court at Great Falls, Montana, this 2nd day of May, 1956.

[Seal] E. WARREN TOOLE,
Clerk, United States District Court for the District
of Montana.

By /s/ C. G. KEGEL,
Deputy Clerk.

[Endorsed]: No. 14983. United States Court of Appeals for the Ninth Circuit. Theodore B. Russell, Appellant, vs. The Texas Company, a Corporation; Frederick T. Manning Drilling Company, a Corporation, and The Northern Pacific Railway Company, a Corporation, Appellees. The Texas Company, a Corporation, Appellant, vs. Theodore B. Russell, Appellee. Supplemental Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed May 7, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

